

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

SOUTHERN POLYMER, INC.,

Case No.

Plaintiff,

Judge:

v.

MASTER EXTRUSION, LLC,

Defendant.

**COMPLAINT**

Plaintiff Southern Polymer, Inc. (“Southern Polymer”), by and through its undersigned attorneys, files this Complaint against Defendant Master Extrusion, LLC (“Master Extrusion”) and, in support thereof, avers as follows:

**Introduction**

1. Southern Polymer brings its Complaint seeking recovery of unpaid invoices, including contractual interest on unpaid amounts. As of the date of this Complaint, Southern Polymer is owed in excess of \$720,000.00.

2. Southern Polymer also seeks a declaratory judgment that any claim made by Master Extrusion against it related to any product sold by Southern Polymer to Master Extrusion is subject to and limited by the applicable written Terms and Conditions of Sale, including but not limited to the “Limited Warranty/Seller Liability” provision contained in such written Terms and Conditions of Sale. A true and correct copy of the applicable written Terms and Conditions of Sale are attached hereto as Exhibit 1.

**Parties**

3. Southern Polymer is a Georgia corporation with a place of business located in 6190 Powers Ferry Road, Suite 290, Atlanta, Georgia 30339.

4. Upon information and belief, Master Extrusion is an Alabama corporation with a place of business located in 632 Smith Road, Albertville, Alabama 35951.

### **Jurisdiction and Venue**

5. This Court has subject matter jurisdiction pursuant to 28 U.S.C. §1332(a)(1).

6. The amount in controversy, exclusive of interest and costs, exceeds the sum of \$75,000.00 and the controversy is between citizens of different states.

7. The Western District of Pennsylvania is an appropriate venue for this action because Southern Polymer and Master Extrusion have consented in writing to venue in the United States District Court for the Western District of Pennsylvania. (*See* Exhibit 1, ¶ 13)

8. This Court has jurisdiction over Master Extrusion because Southern Polymer and Master Extrusion have consented in writing to personal jurisdiction in the United States District Court for the Western District of Pennsylvania. (*See* Exhibit 1, ¶ 13)

### **Factual Background**

#### **A. The undisputed amounts due and owing Southern Polymer by Master Extrusion**

9. Southern Polymer offers, *inter alia*, producer branded prime, Southern Polymer branded prime, and wide-specification polyethylene, polypropylene, polystyrene and PET resins to a diverse array of markets for extrusion, blow molding, injection molding, and compounding applications.

10. Upon information and belief, Master Extrusion is a collated film operation servicing client's needs for laminated or blown film, including collation shrink film, for industries involving beverages, bottled water, bulk packaging, multi pack packaging, plus laminate film to create stand up pouches for pet supplies.

11. During the period July, 2015 through August, 2015, Master Extrusion made five (5) separate purchases from Southern Polymer for medium density polyethylene totaling 962,300

pounds and \$723,706.00 (the “Product”). All such purchases were subject to net 60 days Terms of Payment. In addition, all such purchases were subject to Southern Polymer’s written Terms and Conditions of Sale included as part of Southern Polymer’s invoices.

12. More specifically, Master Extrusion’s purchases from Southern Polymer during the period July, 2015 through August, 2015 were as follows:

<u>Invoice No.</u>	<u>Invoice Date</u>	<u>Net Weight</u>	<u>Price per/lb.</u>	<u>Invoice Amount</u>
0022951	7/7/15	193,300 lb.	0.770000 USD/lb.	\$ 148,841.00
0022952	7/17/15	193,500 lb.	0.770000 USD/lb.	\$ 148,995.00
0023554	8/17/15	192,900 lb.	0.740000 USD/lb.	\$ 142,746.00
0023555	8/17/15	193,000 lb.	0.740000 USD/lb.	\$ 142,820.00
0023637	8/24/15	189,600 lb.	0.740000 USD/lb.	\$ 140,304.00
			Total	\$ 723,706.00

True and correct copies of Southern Polymer’s Invoice Numbers 0022951, 0022952, 0023554, 0023555, and 0023637 (individually an “Invoice” and collectively the “Invoices”) are attached hereto collectively as Exhibit 2.

13. Master Extrusion accepted delivery of the Product subject to Southern Polymer’s Terms of Payment and Terms and Conditions of Sale.

14. Master Extrusion never notified Southern Polymer of any damage, defect or shortage in connection with the Product.

15. Master Extrusion has not paid any amounts due and owing on the Invoices.

16. Master Extrusion’s failure to timely pay the Invoices constitutes a breach of contract with respect to each Invoice.

**B. The disputed amount due and owing Southern Polymer by Master Extrusion**

17. In April, 2015, Master Extrusion purchased from Southern Polymer product known in the industry as “wide spec” which, by definition, carries with it wide ranging specifications and chemical structure that differ markedly from “prime” resins.

18. More particularly, in April, 2015, Master Extrusion purchased 197,200 lbs. of wide spec product at a price of 0.590000 USD/lb. or \$116,348.00 (the "Disputed Product"). Attached hereto as Exhibit 3 is a true and correct copy of Southern Polymer Invoice No. 0021978 reflecting Master Extrusion's purchase of the Disputed Product.

19. The Disputed Product was purchased subject to Southern Polymer's written Terms and Conditions of Sale included as part of Southern Polymer's Invoice No. 0021978. (See Exhibit 3)

20. Master Extrusion accepted delivery of the Disputed Product subject to Southern Polymer's Terms and Conditions of Sale.

21. In or about October, 2015, Master Extrusion notified Southern Polymer that the Disputed Product was something other than what it was represented to be and made a claim for alleged damages in excess of \$900,000.00.

22. To date, Southern Polymer and Master Extrusion have not been able to satisfactorily resolve their issues related to the Disputed Product.

23. Master Extrusion has informed Southern Polymer that it will not pay the Invoices, which are not disputed, until Southern Polymer resolves its alleged damages in connection with the Disputed Product.

24. Southern Polymer's Terms and Conditions of Sale include, *inter alia*, the following provision entitled "INSPECTION AND CLAIMS":

Buyer shall inspect and test all Products delivered hereunder for damage, defect or shortage upon receipt and before use or incorporation into any manufacturing or other process, and shall notify Seller of any damage, defect or shortage within ten (10) days of receipt. Buyer assumes all risks for use of non-conforming Products. All claims for any cause whatsoever, whether based in contract, negligence or other tort, strict liability, breach of warranty or otherwise, shall be deemed waived unconditionally and absolutely unless Seller received written notice of such claim not later

than thirty (30) days after delivery, as set forth in paragraph 4 above, of the Products that are the subject of such claim.

(Exhibit 2, ¶ 5)

25. Master Extrusion did not provide timely notice of any damage, defect or shortage of the Disputed Product in accordance with Southern Polymer's Terms and Conditions of Sale.

(See Exhibit 2, ¶ 5)

26. Southern Polymer's Terms and Conditions of Sale also include, *inter alia*, the following limitation of liability provision:

7. LIMITED WARRANTY/SELLER LIABILITY. The warranties described in this paragraph are in lieu of all other warranties. Seller warrants that the Product sold by Seller to Buyer shall, when delivered, conform to Seller's published specifications for the Products or such other specifications that have been agreed to by the parties in writing. SELLER EXPRESSLY LIMITS ITS WARRANTY TO THE TERMS SET FORTH IN THE PRECEDING SENTENCE, AND HEREBY EXCLUDES ALL OTHER WARRANTIES EXPRESS OR IMPLIED (EXCEPT THE IMPLIED WARRANTY OF TITLE), IN PARTICULAR EXCLUDING ANY AND ALL WARRANTIES OF MERCHANTABILITY, FITNESS FOR ANY PARTICULAR PURPOSE (WHETHER OR NOT THAT PURPOSE IS KNOWN TO SELLER), NON-INFRINGEMENT OF THIRD PARTY INTELLECTUAL PROPERTY RIGHTS, OR ANY WARRANTIES ARISING FROM A COURSE OF DEALING, USAGE OR TRADE PRACTICE. SELLER LIKEWISE LIMITS THE REMEDIES AVAILABLE TO BUYER TO REPAIR OR REPLACEMENT OF ANY DEFECTIVE PRODUCT OR REFUND OF THE PURCHASE PRICE PAID THEREFOR, AS SELLER ELECTS. IN NO EVENT SHALL SELLER'S LIABILITY FOR ANY PRODUCT CLAIM EXCEED THE COST OF THE PRODUCT WHICH IS THE SUBJECT OF THE CLAIM, REGARDLESS OF WHETHER THE CLAIM IS MADE IN CONTRACT (INCLUDING BREACH OF WARRANTY), TORT (INCLUDING NEGLIGENCE), STRICT LIABILITY, INDEMNITY, OR OTHERWISE, AND REGARDLESS OF WHETHER SELLER KNEW OR SHOULD HAVE KNOWN OF THE POSSIBILITY OF OTHER DAMAGES. IN NO EVENT SHALL THIS WARRANTY BE EXPANDED BY ANY ADVICE, EXPERIMENTATION OR OTHER PARTICIPATION WHICH SELLER MAY RENDER IN THE DESIGN DEVELOPMENT OF THE PRODUCT OR ANY PARTS OR COMPONENTS OF THE PRODUCT. IN NO EVENT SHALL SELLER BE LIABLE FOR ANY RECALL EXPENSES, LOSS OF INCOME, LOSS OF PROFITS, OR

CONSEQUENTIAL, PUNITIVE, INDIRECT, EXEMPLARY, SPECIAL  
OR INCIDENTAL DAMAGES WHATSOEVER.

(Exhibit 2, ¶ 7)

**COUNT I**  
**BREACH OF CONTRACT**

27. Southern Polymer incorporates by reference and realleges Paragraphs 1 through 26, inclusive, as though fully set forth herein.

28. Southern Polymer duly performed and satisfied all conditions, promises and obligations required to be performed or satisfied regarding the Product thereby triggering Master Extrusion's obligation to make timely payment for the Product in accordance with the Invoices and related Terms and Conditions of Sale.

29. Master Extrusion has failed to make payment to Southern Polymer for the Product in accordance with the Invoices and related Terms and Conditions of Sale.

30. Master Extrusion's acceptance of the Product and failure to pay Southern Polymer for same constitutes a breach of contract with respect to each Invoice.

31. As a direct and proximate result of Master Extrusion's breach of contract, Southern Polymer has not received the benefit of its bargain and has suffered damages in excess of \$720,000.00 to date.

**COUNT III**  
**UNJUST ENRICHMENT**

32. Southern Polymer incorporates by reference and realleges Paragraphs 1 through 31, inclusive, as though fully set forth herein.

33. Master Extrusion incurred a benefit by acceptance of the Product.

34. Master Extrusion has not paid Southern Polymer for the Product.



35. Master Extrusion has been unjustly enriched by its acceptance and possession of the Product without a commensurate benefit to Southern Polymer in return.

36. Master Extrusion has been unjustly enriched in an amount in excess of \$720,000.00.

**COUNT III**  
**DECLARATORY JUDGMENT**

37. Southern Polymer incorporates by reference and realleges Paragraphs 1 through 36, inclusive, as though fully set forth herein.

38. As set forth above, the Disputed Product and any amount due Southern Polymer by Master Extrusion for, and any alleged damages suffered by Master Extrusion in connection with, the Disputed Product remain the subject of dispute between the parties.

39. Pursuant to Southern Polymer Invoice No. 0021978 and the related Terms and Conditions of Sale, Southern Polymer's liability, if any, is limited as follows:

IN NO EVENT SHALL SELLER'S LIABILITY FOR ANY PRODUCT CLAIM EXCEED THE COST OF THE PRODUCT WHICH IS THE SUBJECT OF THE CLAIM, REGARDLESS OF WHETHER THE CLAIM IS MADE IN CONTRACT (INCLUDING BREACH OF WARRANTY), TORT (INCLUDING NEGLIGENCE), STRICT LIABILITY, INDEMNITY, OR OTHERWISE, AND REGARDLESS OF WHETHER SELLER KNEW OR SHOULD HAVE KNOWN OF THE POSSIBILITY OF OTHER DAMAGES. IN NO EVENT SHALL THIS WARRANTY BE EXPANDED BY ANY ADVICE, EXPERIMENTATION OR OTHER PARTICIPATION WHICH SELLER MAY RENDER IN THE DESIGN DEVELOPMENT OF THE PRODUCT OR ANY PARTS OR COMPONENTS OF THE PRODUCT. IN NO EVENT SHALL SELLER BE LIABLE FOR ANY RECALL EXPENSES, LOSS OF INCOME, LOSS OF PROFITS, OR CONSEQUENTIAL, PUNITIVE, INDIRECT, EXEMPLARY, SPECIAL OR INCIDENTAL DAMAGES WHATSOEVER.

(Exhibit 3, ¶ 7)

40. Master Extrusion refutes the validity and application of the limitation of liability provision contained in Southern Polymer's Terms and Conditions of Sale incorporated in Invoice No. 0021978.

41. As such, an actual and justiciable controversy currently exists between Southern Polymer and Master Extrusion.

WHEREFORE, Southern Polymer, Inc. respectfully requests judgment in its favor against Defendant Master Extrusion, LLC in an amount in excess of \$720,000.00, plus interest and such other relief as the Court deems just and proper. Southern Polymer, Inc. also prays that this Court find and declare that the Terms and Conditions of Sale incorporated into Southern Polymer, Inc.'s Invoice No. 0021978, including the limitation of liability provision, are valid and enforceable, and any claim by Master Extrusion arising out of or in connection with the product sold by Southern Polymer and purchased by Master Extrusion pursuant to Invoice No. 0021978 in excess of such limit is barred.

Respectfully submitted,

HOUSTON HARBAUGH, P.C.

Dated: December 23, 2015

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